IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1037

KAMEN SOAP PRODUCTS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, DENIED 30TH DAY OF JUNE, 1958.

SAMUEL E. HIRSCH,
38 S. Dearborn Street,
Chicago, Illinois,
Attorney for Petitioner.

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PETITION FOR REHEARING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, DENIED 30TH DAY OF JUNE, 1958.

The petitioner, Kamen Soap Products Company, Inc., prays that a rehearing be granted on the denial of its petition for a writ of certiorari, to review the judgment of the United States Court of Claims dismissing its petition in the nature of an independent bill of review to set aside a prior judgment of the Court of Claims obtained on false testimony.

This petition is filed under rule 58, section 2. On March 5, 1958, the Court of Claims denied petitioner's timely motion for a rehearing. Said petition for rehearing presented to the Court of Claims the affidavits of Blossom Levinson, of 2055 Rockaway Parkway, Brooklyn, N. Y., and of Harriet C. Freiman of 3017 Brighton 2nd Street, Brooklyn, N. Y., formerly employed by petitioner as a stenographer and assistant bookkeeper, respectively, defi-

nitely recollecting the inter-office communications between the New York office and Barberton, Ohio, offices of petitioner, and definitely recalling their presence in the files of the petitioner. Copies of these affidavits are attached hereto as Exhibits A and B. This testimony was not available at the trial because the affiant had left petitioner's employ and petitioner was unable to ascertain the married names of affiants until long after the trial in the Court of Claims, according to information supplied by Mr. Abe Kamen.

Since the original finding of fraud in the Court of Claims was based on two assumptions, both shown to be erroneous, namely, first, the authenticity of the so-called abstract of the bid, fully gone into on the petition for certiorari, and second, the failure to produce the original or office copy carbons of the eight inter-office communications, the Court of Claims assumed that the covering letter submitted with the bid and the seven office communications were false and fraudulent and disbelieved Abraham Kamen's testimony in total.

With the testimony of affiants and their subjection to cross-examination, both foundations for the finding of fraud will be totally swept away. Upon a retrial in the Court of Claims, the new witnesses will be subject to cross-examination and the issue of fraud based upon the false testimony of the three government witnesses to the effect that, although they had no independent recollection as to whether or not the covering letter of May 9, 1947, was in the file, will be fully tried in its true light.

The Government in its opposition to petitioner's request for relief has repeatedly asserted that the absence of proof the existence of the seven inter-office communications and the failure to locate or produce either the originals or authenticated first carbons, showed that the copies of the said inter-office communications were spurious and

did not exist. The testimony of the affiant, the bookkeeper and stenographer, will conclusively prove that such inter-office communications were bona fide, did exist and represented communications that took place about the time of the acceptance of the bid.

As above stated, the foregoing evidence of the affiants was not available due to the fact that petitioner and its president, Mr. Kamen, did not know the married name of the witnesses.

In short, the newly discovered evidence referred to in the petition for certiorari and presented to the court below clearly proves that the three Army officers and the civilian employee of the Quartermaster's Department testified to an untruth when they identified the abstract of the bid at the trial as being a true copy of said abstract and being a true copy of their *original signatures*. Instead, the copy produced both at the Court of Claims of said abstract of bid and at the criminal trial in the District Court of the District of Columbia, were not facsimile copies of original signatures of the witnesses. No proof was offered showing who, when or where the copies of the abstract admitted in evidence in the Court of Claims were made.

Thereupon the indictment in the District Court was dismissed. See Exhibit C.

There is a tremendous difference between a *facsimile* copy of a signature and a rubber-stamp copy obviously merely the writing and obviously a copy in the handwriting of another person, of the purported signatures.

The newly discovered evidence, not available at the trial, proves that the seven inter-office communications were sent and were recalled by witnesses as of the time they were made, the argument that they did not exist and that spurious copies were submitted, fails totally.

The result of the denial of the petition will cause peti-

tioner to lose its day in Court and so lose its opportunity to prove a claim against the Government for breach of contract, involving hundreds of thousands of dollars and will result in the economic ruin of the petitioner.

We firmly believe that the situation demands a new trial clearly upon grounds falling within both the common law and statutory intent of the law governing relief upon newly discovered evidence not available at the time of trial.

We also earnestly feel that the novel question of law involving the vital question of the application of Rule 54(b) of the Court of Claims, substantially identical to Rule 60(b) of the Federal Rules of Civil Procedure, should be passed upon by this Court in the interest of public law and as an administrative guide to the lower federal courts.

Rule 54(b) of the Court of Claims as well as the common law rule evolved, concerning the writ of error *coram nobis*, clearly provide that a party seeking a new trial due to the discovery of evidence after the judgment and after term time, may both present a motion for a new trial and if not successful, subsequently thereto, file a petition in equity in an independent suit seeking to enjoin the enforcement of the judgment and seeking to set it aside upon equitable grounds.

Upon the motion, errors patent upon the face of the record could be relieved and corrected by the court without hearing. But matters involving a trial of the facts stated in the motion, such as in the case at bar, involving an issue whether the document purporting to be the abstract of the bid and purporting to bear only handwritten copies of signatures, obviously could *not* be justly determined upon the face of the motion, without the further hearing of evidence. For this reason, both the common law and the statutory law provided that an independent suit in equity in the nature of a bill for review would lie to grant equi-

table relief against the enforcement of a judgment under such circumstances.

Whether the testimony of the three Army officers and civilian employees in charge of the opening of the bid, the processing thereof and the making of the abstract, was intentionally false or inadvertently false is wholly immaterial. The point is, that a judgment forfeiting a claim against the United States, once approved administratively by the Quartermaster's Department was forfeited because of false testimony, whether intentionally false or not.

Said claim was also forfeited upon the theory that Abe Kamen, president of the petitioner, lied when he testified that he sent his covering letter and that the seven inter-office communications concerning the acceptance of the bid and the execution of the contract took place. Two new disinterested witnesses executed affidavits proving that the seven inter-office communications existed at the time of their purported date.

In conclusion, we urge that under the rules of newly discovered evidence, a rehearing of the case under Section 33 of the United States Supreme Court Section 2 should be granted and the petition of certiorari should be granted and that this Court in its supervisory powers over the lower Federal Courts should construe Rule 54 (b) of the Court of Claims identical to Rule 60 (b) F. R. C. P.

Respectfully submitted,

KAMEN SOAP PRODUCTS COMPANY, INC.,
a corporation,

By .....

Its Attorney.

I, SAMUEL E. HIRSCH, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay, and that the petition is restricted to substantial grounds available to petitioner although not previously presented to this Court in the original petition save and except data presented referring to Rule 54B of the Court of Claims which data counsel feels should merit reconsideration by the United States Supreme Court.

Dated July 10, 1958.

Attorney for Petitioner.

EXHIBIT A.

Subject: Contract awarded 28 May 1947 to the Kamen Soap Products Co., Inc., for 2,190,000 lbs. of Soap, Laundry, Powdered, High Titre, Quartermaster Corps Tentative Specification JCQD #27.

AFFIDAVIT.

I, BLOSSOM LEVINSON, residing at 2055 Rockaway Parkway, Brooklyn, N. Y., do certify that I was employed by Kamen Soap Products Co., Inc. from February, 1946 to November, 1950.

During this time, I was employed as a stenographer and took most of the dictation in the office and used the initials BIO on all letters dictated to me and then typed by me.

I also certify that I signed an affidavit relating to the Quartermaster among other persons in the organization, such as Max Kamen, Herbert Shapiro, Miriam Weissman and A. L. Kamen. Everyone signed their affidavit without any pressure or coercion in any way, and of their own free will. This affidavit was in reference to the efforts made by the employees and associates of Kamen Soap Products Co., Inc. to obtain shipping instructions and VSD's, during the months of June and July of 1947, from the Quartermaster, U. S. Army at 16th Street, New York City.

I also certify that in the Fall of 1949, the firm was having a very hectic time due to the matter of the Quartermaster breaching this Contract. Everyone in the office, including myself, was asked to look high and low in the very messy files for certain inter-office correspondence from Barberton to New York and New York to Barberton. These were subsequently found. I remember joining in the search therefor.

I further certify that after these letters were found, I was instructed to make many copies of same.

I particularly remember that one of the letters found contained one of Mr. Kamen's pet expressions "Clear the decks for action" and referred to getting ready to make deliveries on contract of bid of May 19, 1947.

All the above is true and correct to the best of my knowledge.

BLOSSOM LEVINSON.

Witnessed By:

S. E. HIRSCH,

EILEEN KEANE.

SUBSCRIBED AND SWORN To before me on February 11, 1957.

E. LOUISE RAUER,
Notary Public.

(SEAL)

E. LOUISE RAUER
Notary Public, State of New York
No. 31-3213500
Qualified in New York County
Term expires March 30, 1957

EXHIBIT B.

Subject: Contract awarded 28 May 1947 to the Kamen Soap Products Co., Inc., for 2,190,000 lbs. of Soap, Laundry, Powdered, High Titre, Quartermaster Corps Tentative Specification JCQD #27.

AFFIDAVIT.

I, HARRIET C. FREIMAN, residing at 3017 Brighton 2nd Street, Brooklyn, New York, certify that I was employed by Kamen Soap Products Co., Inc. from December 1943 to February 1947 and then again from April 1949 to March 1951.

During the time of my employment, I was an Assistant Bookkeeper. Miss Miriam Weissman was the Head Bookkeeper. I took instructions from Miss Weissman and Mr. A. L. Kamen.

Upon my re-employment by Kamen Soap Products Co., Inc., I recall Miss Blossom Ortsman typed many copies of interoffice letters, the originals of which were located in the files. These original letters were found by the girls who were employed at that time, among them were Miss Weissman, Miss Ortsman and myself.

Furthermore, from my long and pleasant association with you and Miss Weissman and speaking from past experience, I am of the opinion that you would never have asked Miss Weissman to sign an affidavit unless you were sure of the facts and that she in turn would not have signed an affidavit unless she was sure of the facts.

All the above is true and correct to the best of my knowledge.

HARRIET C. FREIMAN.

Witnessed By:

LOUIS COHN,

FREDERICK J. ARCARO.

SUBSCRIBED AND SWORN To before me on 12 Feb. 1957.

LOUIS B. SODSISKY,
Notary Public.

LOUIS B. SODSISKY
Notary Public, State of New York
No. 24-9099880
Qualified in Kings County
Commission Expires March 30, 1957

EXHIBIT C.

UNITED STATES DISTRICT COURT
For the District of Columbia.

United States
vs.
Abraham L. Kamen,
Defendant.
} Criminal No. 778-54.

Filed May 19, 1955.

On this 19th day of May, 1955, came the attorney of the United States, the defendant in proper person and by his attorney, requires and upon consideration of the government's oral motion for leave to dismiss, the indictment in the above entitled case, it is ordered that leave to dismiss the indictment be and the same is hereby granted.

Whereupon the United States Attorney dismisses the indictment in the above entitled case in open Court.

The defendant is discharged from further consideration in this case.

By direction of:
BOLITHA J. LAWS,
Presiding Judge,
Criminal Court # Assign.
HARRY M. HULL,
Clerk,
By JOHN H. HESS,
Deputy Clerk.

Present:
United States Attorney,

By EDWARD O. FENNELL,
Assistant U. S. Attorney,
C. MACREYNOLDS,
Official Reporter.